Supreme Court of the United States

JANUARY TERM, 1967.

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No. 986

NATHALIE L. DUPONT,
Respondent,

versus

SOUTHERN PACIFIC COMPANY,
Petitioner.

VELMA MARGARET DUPONT, Individually and next friend for MARK VILLEJOIN,
Respondent,

versus

SOUTHERN PACIFIC COMPANY,
Petitioner.

NATHALIE LEGER, ET AL.,
Respondents,

versus

SOUTHERN PACIFIC COMPANY,
Petitioner.

ANNA LOUISE DUPONT TRAHAN, Individually and next friend for MICHAEL JOSEPH TRAHAN,
Respondent,

versus

SOUTHERN PACIFIC COMPANY,
Petitioner.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT.

The Southern Pacific Company, petitioner, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit in the above entitled case.

OPINIONS BELOW.

There is no written opinion on the merits by the District Court in *Dupont v. Southern Pacific Company;* the opinion of the United States Court of Appeals for the Fifth Circuit in this case (Appendix "A", *infra,* p. 27) is reported at 366 F.2d 193.

JURISDICTION.

The judgment of the United States Court of Appeals for the Fifth Circuit in *Dupont v. Southern Pacific Company* (No. 22,412) was entered on September 21, 1966, (Appendix "B" *infra,* p. 42). A rehearing

in this case was denied by the Fifth Circuit Court of Appeals on October 24, 1966 (Appendix "C", *infra*, p. 44). The jurisdiction of this Court is invoked under 28 U.S.C., Section 1254.

QUESTION PRESENTED.

1. Whether the Court of Appeals for the Fifth Circuit can disregard the broad discretion granted the District Judge by Rule 42 (a) of the Federal Rules of Civil Procedure and find reversible error in the District Judge's consolidation of cases and designation of lead counsel where there is no showing in the record that the consolidation and designation of lead counsel affected the substantial rights of the parties.

STATEMENT.

On June 25, 1961, a Southern Pacific Company train struck an automobile at a railroad crossing in Lafayette Parish, Louisiana. There were three passengers in the automobile in addition to the driver, and all four of the occupants of the automobile were killed in the collision. As a result of this accident, eleven separate law suits were filed by various survivors of the four decedents. These eleven law suits, pursuant to rulings on certain motions, were reduced to four law suits, one by the survivors of the driver, and one by the survivors of each of the three guest passengers. These suits bear civil action numbers 8896, 9113, 9114

and 9124 on the docket of the United States District Court for the Western District of Louisiana.

By an order dated August 15, 1963, the District Judge *sua sponte* ordered these four cases consolidated for trial, and designated Mr. J. Minos Simon, attorney of record for the survivors of the three deceased passengers, as lead counsel to handle the presentation of the plaintiffs' cases (R. 184).

After a trial to a jury, a general verdict was returned in favor of the defendant, Southern Pacific Company, in each of the four cases presented. The plaintiffs appealed from the decision, and the Fifth Circuit Court of Appeals reversed and remanded all four of the cases stating that the consolidation of the cases brought by the survivors of the guest passengers with the case brought by the survivors of the driver, and the designation of a lead counsel to represent all plaintiffs was an abuse of the trial judge's discretion and "created an impossible situation which resulted in neither set of plaintiffs receiving the representation to which they are entitled." *(Dupont v. Southern Pacific Company, 366 F.2d 193, 197 (1966).)*

REASONS FOR GRANTING THE WRIT.

I. The Cases Were Properly Consolidated For Trial And There Was No Abuse Of Discretion On The Part Of The Trial Judge.

It is submitted by defendants herein that the judgment of the Court of Appeals for the Fifth Circuit is

in error in concluding that the consolidation of these four cases was an abuse of discretion on the part of the trial judge, and the decision of the Fifth Circuit so holding seriously restricts the discretionary powers of the trial judge which are granted under Federal Rule of Civil Procedure 42 (a).

Rule 42 (a) provides:

> "Consolidation. When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all the matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings therein as may tend to avoid unnecessary costs or delay."

Federal Rule 61 provides the general rule for determining whether reversible error in the proceedings at trial has been committed by stating, in part, that:

> "The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties."

The general rule concerning the discretion of the trial judge under Rule 42 (a) of the Federal Rules of Civil Procedure is well stated by the Fifth Circuit Court of Appeals in their decision in this case as follows:

> "(1) Trial judges are urged to make good use of Rule 42 (a) of the Federal Rules of Civil Pro-

cedure where there is involved a common question of fact and law as to the liability of the defendant in order to expedite the trial and eliminate unnecessary repetition and confusion; and where the parties are represented by different counsel and the trial court permits full and complete development of the evidence by all parties, equal opportunity for argument, a clear and complete charge on the facts and the law applicable to the respective theories of all parties, the order of consolidation by the trial judge will not be disturbed on appeal except for abuse of discretion. Whiteman v. Pitrie, 220 F.2d 914 (5th Cir. 1955); Plough v. Baltimore & O.R. Co., 172 F.2d 396 (2nd Cir. 1949); Davis v. Yellow Cab Co. of St. Petersburg, 220 F.2d 790 (5th Cir. 1955); 5 Moore's Fed. Practice, Par. 42.02, p. 1204 (2nd ed. 1964); Walker v. Loop Fish & Oyster Co., 211 F.2d 777 (5th Cir. 1954); Polito v. Molasky, 123 F.2d 258 (8th Cir. 1941)." *(Dupont) v. Southern Pacific Company, 366 F.2d 193, 195.)*

However, after properly stating the general rule and recognizing the jurisprudence in the area of consolidation of cases for trial, the Fifth Circuit, relying heavily on the case of *Atkinson v. Roth, 297 F.2d 570 (3rd Cir. 1961)*, concluded that consolidation in the instant cases constituted an abuse of the trial judge's discretion and required that the cases be reversed and remanded for a second trial. As was ably pointed out by Judge Thornberry, dissenting in *Dupont v. Southern Pacific Company*, the case of *Atkinson v.*

Roth, supra, is not controlling here. A brief examination of the factual situation in the *Atkinson* case will clearly point out its inapplicability.

In *Atkinson* seven different law suits arising out of a single collision between an automobile and a truck were consolidated for trial. Atkinson was the driver of the automobile, and there were five guest passengers in his vehicle. Atkinson himself appeared as plaintiff in one suit, as defendant in another, as third party defendant in two other suits, and as defendant and third party plaintiff in the remaining three suits. The verdicts against the plaintiffs in the various suits were based on the answers returned by the jury to special interrogatories submitted to them, and no general verdict was rendered.

The third circuit in *Atkinson v. Roth* relied on several matters in reversing certain of the verdicts rendered. The chief among these was the confusion resulting from certain instructions given the jury concerning contributory negligence. The Court further noted, with regard to the instructions, that the trial court failed to charge the jury that the negligence of Atkinson (the driver) could not be imputed to his passengers, such failure being basic error in Pennsylvania. Finally, the Court noted that the motion to consolidate should not have been granted because the consolidation burdened the parties, the court and the jury with an *overcomplication of issues and necessary instructions.* In closing this discussion of the various problems created by the consolidation in this instance, the Court stated:

"All of the suits stating claims by passengers or their representatives however, could proceed without conflict. But Atkinson as a plaintiff was obliged to keep his case free of contributory negligence, and in this he was at cross purposes with the other plaintiffs. The presence of Atkinson, *qua* defendant, in the same trial with Atkinson, *qua* plaintiff, emphasizes the conflict. *In these circumstances,* proper concern for due administration of justice seems to indicate to us the wisdom of avoiding another trial in which Atkinson appears as a plaintiff along with his passengers or their representatives." (Emphasis added.)

The instant case presents a factual situation which contrasts sharply with the mass confusion created by consolidation of the cases in *Atkinson v. Roth.* An examination of the pleadings in each of the four cases with which we are here concerned shows that the only defendant in each case is the Southern Pacific Company, and that the only allegations of negligence in any of the four cases are against the Southern Pacific Company.

Mrs. Nathalie Leger Dupont in her suit for the death of her son, Bussey Dupont, (Civil Action #8896), affirmatively alleged in her complaint that Trahan, the driver, made a careful and prudent approach to the crossing, and because of the obstructions to the view, he was unable to discover the presence of the train in sufficient time to avoid being struck by it. (Article VII of the complaint.) In Article VIII of the complaint,

she alleged that the negligence of Southern Pacific Company's employees was the, or a proximate cause of the collision and the death of Bussey. The only defendant was Southern Pacific Company.

Mrs. Nathalie Leger Dupont, in Civil Action #9114 was joined by her children in suing for the death of Lucien Dupont, a passenger. In the complaint, it is affirmatively alleged that the accident and the death of the said Lucien Dupont was caused solely and proximately by the gross negligence of defendant's agents, i.e., agents of Southern Pacific Company. (Article III of the complaint.) The only defendant was Southern Pacific Company.

In Civil Action #9113, "Velma Margaret Dupont, et al. vs. Southern Pacific Company," the suit for the death of Claude David Villejoin, another passenger, plaintiffs affirmatively alleged in Paragraph III of their petition:

> ". . . that the death of the said Claude David Villejoin resulted solely and proximately from the negligence of the agents of said Defendants here."

The only defendant was Southern Pacific Company.

In Civil Action #9124, Anna Louise Dupont Trahan, et al. vs. Southern Pacific Company, the survivors of the driver alleged in Paragraph III of the complaint:

> ". . . that the death of the said Andrus Joseph Trahan resulted solely and proximately from the negligence of the agents of said Defendant herein."

Each of the four suits was answered by defendant, Southern Pacific Company, on the basis that the Southern Pacific Company was guilty of no negligence and that each of the respective defendants was guilty of independent contributory negligence. No issue of imputation of negligence was raised by defendants.

Subsequent to the answer of defendant, a pre-trial stipulation was filed in this case in which all of the parties were required by the District Court to set forth their respective contentions. Plaintiffs never included therein any contention whatever by the survivors of the passengers that the driver of the automobile was also negligent. Furthermore, in the joint pre-trial brief filed by all Plaintiffs, the following is found:

> "The issues as to Defendant's liability are essentially the same as to the various Plaintiffs, with the important exception of the effect of any contributory negligence on the part of the driver, Andrus Trahan, *although all Plaintiffs deny there was any contributory negligence on the part of any of the four occupants of the automobile.*" (Emphasis ours.)

After discussing in some detail the facts which they proposed to prove on the trial of the case, *all* of the Plaintiffs argued on Page 5 of their pre-trial brief:

> "Thus, it was not Trahan's failure to stop which prevented his being aware of the approaching train, but the other circumstances mentioned . . . It is plain that *Trahan was guilty of no negligence* as would bar recovery by his heirs.

> "But, the remaining Plaintiffs also point out that if he had been negligent in failing to stop, look and listen, and if this failure be deemed a proximate cause of the accident, still there was no such negligence on the part of the other three occupants of the car."

The Court, having all of the issues before it, in pleadings, briefs and pre-trial stipulations correctly concluded that there was no obstacle to the consolidation, that the different rules of law applicable to the survivors of the driver and the passengers could be adequately covered by the instructions, and that the cases could be consolidated and tried without prejudice. *Plough v. Baltimore & Ohio Railroad Company, 172 F.2d 396 (2nd Cir. 1949); Nettles v. General Accident Fire & Life Assurance Corporation, 5th Cir. 1956, 234 Fed. 243; Miller v. Sammarco, 9 F.R.D. 215, (Ohio, 1949); Poulson v. Louisiana, Arkansas & Texas Trans. Co., D.C. La. 1947, 7 F.R.D. 484.*

The Court, *sua sponte*, ordered the cases consolidated. Thereafter, for the first time, Plaintiffs raised the issue of conflict of interest and objected to the consolidation. It is submitted that the Plaintiffs, by their briefs, pleadings, arguments, and pre-trial stipulations led the court to the conclusion that no conflict of interest existed, and they cannot complain about it by adopting an entirely different contention to the effect that a conflict of interest did, in fact, exist. *Lake City, etc. v. Luehrmann, 113 F.2d 458; Capella v. Zurich General Accident Liability Insurance Com-*

pany, 194 F.2d 558; Orenstein v. United States, 191 F.2d 184; Divine v. Zimmerman, 133 F.2d 850; Petersen v. Chicago Great Western Railroad Company, 138 F.2d 304; Smailes v. O'Malley, 127 F.2d 410; Rosaly v. Gonzales, 106 F.2d 169.

As the only concern of the plaintiffs, shown by their briefs, stipulations and pleadings, appears to be the possible effect of the contributory negligence of the driver, the instructions of the court on this point become pertinent. These instructions were as follows:

> "As to the passengers, guest passengers in a car, however, the relationship is different. Under ordinary circumstances, a person riding in an automobile is entitled to rely upon the driver to use reasonable and ordinary care for his safety, and he is not required to monitor or attempt to control the operation of the vehicle, unless he has actual knowledge that the driver is incompetent or unfit to perform the function of driving the car. He is not required to look out for sudden or unexpected dangers that may arise on the road. In such cases, if the driver of the vehicle is negligent, his negligence will not be imputed or charged against the passenger in the car, and the passenger may recover even if the driver be found contributorily negligent, provided, of course, you find the defendant guilty of negligence which was a cause in fact, or proximate cause of the accident, as heretofore discussed." (R. 612-613.)

Thus, in comparing this case to *Atkinson v. Roth*, we find that here the jury was correctly instructed on imputation of negligence, none of the parties appear in the case as both plaintiff and defendant, the driver of the automobile was not faced with the problem of "keeping his case free from contributory negligence" any more than were the passengers who were also obliged to keep their cases free from contributory negligence, and, in the case of both the driver and the passengers, the only allegations of contributory negligence in the pleadings were raised by the common defendant, Southern Pacific Company.

Though it is well settled law that an appellate court cannot assume the jury disregarded the instructions given it by the trial judge (see authorities cited on page 21, *infra*), the Fifth Circuit concluded that the jury in this case disregarded its clear and concise instructions and imputed the negligence of the driver to the guests merely because the jury first returned a verdict only against the driver. The pertinent language of the court is as follows:

> "The four cases as consolidated were tried to a jury; and after several hours of deliberating, the jury returned a verdict in favor of defendant against the survivors of the driver. Whereupon, without disclosing what the verdict was, the trial court instructed the jury to continue its deliberations and to return a verdict in all four cases. Sometime thereafter the jury returned four general verdicts in favor of the defendant and against all of the plaintiffs." (366 F.2d 193, 195.)
>
> . . .

"In view of the jury verdict and the manner in which it was returned, we must conclude that some confusion existed with the probability that the jury in some way imputed the negligence of the driver to the guest passengers contrary to the instructions of the court, all of which resulted to the prejudice of the parties caused by the order of consolidation with the designation of a lead counsel to represent all of the plaintiffs." (366 F.2d 193, 198.)

However, the record clearly shows that the jury, by returning only one verdict, intended to reject all claims and was attempting to follow the court's instructions in doing so. We call specific attention to pages 617 and 618 of the transcript of testimony where in the court, in explaining to the jury how to prepare its verdict, made reference to the verdict forms in the dirver's case and stated:

"On the other hand, if your verdict in this case, *or any of the others,* should be for the Defendant, you use this form (Court reads,)

"We, the Jury in the above entitled and numbered cause, find in favor of the Defendant, Southern Pacific Company, and against the Plaintiff Anna Louise Dupont Trahan, widow of Andrus Joseph Trahan, and Michael Joseph Trahan, son of Andrus Joseph Trahan."

"Date it and have your foreman sign it."

The Court clearly indicated that the jury should use the Trahan form of verdict if the verdict in the Trahan case, or any of the others, was for the Defendant. The Jury simply followed his instructions and used that form of verdict for all of them. When advised by the Court that a separate verdict must be returned in each case, the jury did so in five minutes, which clearly indicates the original verdict returned against the driver only was intended to apply to all plaintiffs.

It would be difficult to imagine a case in which there are more common issues of law and fact and less possible conflicts between the contentions of the various parties than we have presented here. Consequently, it is submitted that the trial judge acted properly in consolidating the cases for trial and no prejudice whatever resulted to any of the parties by virtue of the consolidation.

II. No Conflict Of Interest Was Created By Designating A Lead Counsel For All Parties Plaintiff.

The Fifth Circuit Court of Appeals in reversing these cases, placed heavy emphasis on the alleged conflict of interest created by the appointment of lead counsel to represent both the plaintiffs who were the survivors of the driver of the automobile and the plaintiffs who were the survivors of the passengers in the automobile. From an examination of the contentions set forth in the complaints, pre-trial stipulation and pre-trial briefs it clearly appears there is no conflicting interest which might be held by the survivors

of the driver as opposed to the survivors of the passengers. Of course, had the survivors of the passengers joined the driver's estate as a party defendant in their various suits and alleged that the demise of the passengers was caused through the joint negligence of the driver and the Southern Pacific Company, there could be some basis for finding a conflict of interest. However, as previously pointed out, the sole allegation of negligence in each of the four complaints, plaintiffs' joint pre-trial brief and joint pre-trial stipulation was made against the sole defendant, Southern Pacific Company, and the driver's estate was never named as party defendant in any of the cases. The sole allegation of contributory negligence raised by the plaintiffs arose in the plaintiff's motion opposing the consolidation of the cases for trial, and would appear to be merely an afterthought on their part. The Fifth Circuit Court of Appeals stated that:

> "In representing all plaintiffs, lead counsel must contest contributory negligence on the part of the driver, but in doing so he increases his burden and prejudices the interest of his clients, the survivors of the passengers, since the negligence of the driver not being imputed to the passengers would permit the survivors of the passengers to recover notwithstanding a finding of contributory negligence on the part of the driver."

It appears, that the situation of all of the parties with respect to the negligence of the others is basically the same. Each plaintiff had to contend with the allegation by defendants that the accident was caused

by the negligence of each of the decedents. Again, the plaintiffs were not suing each other, but all were bringing their full claim to bear against the Southern Pacific Company and each alleged that the proximate cause of the accident was the negligence of the defendant, Southern Pacific Company. Had there been any serious contention by any of the parties plaintiff that their case was based on the contributory negligence of the driver as well as the alleged negligence of the Southern Pacific Company, such an allegation would have appeared in the pleadings. However, the pleadings in these cases show that there is no claim of contributory negligence by the survivors of the passengers against the survivors of the driver, and these pleadings are judicial confessions.

The plaintiffs cannot simply brush aside the allegations which they made in their pleadings, because they are bound by them. The courts have always recognized the sanctity of judicial proceedings and the binding character of judicial allegations made by the parties in court.

Article #2291 of the Civil Code of Louisiana provides:

> "The judicial confession is the declaration which the party, or his special attorney in fact, makes in a judicial proceeding.
>
> It amounts to full proof against him who has made it.
>
> It cannot be divided against him.

It cannot be revoked, unless it be proved to have been made through an error of fact. It cannot be revoked on a pretense of an error of law."

The fact that a party is bound by his judicial allegations has often been emphasized in the jurisprudence.

"A party will not be permitted to deny what he has solemnly acknowledged in a judicial proceeding. The only means of the Court to protect the integrity of judicial proceedings are the sanctity which the law throws around them." *Cooney vs. Rousset, 3 Orleans Appeals, 249.*

"A person will not be permitted to deny what he has solemnly acknowledged in a judicial proceeding." *Stoma vs. Smith, 172 So.2d 202.*

"Parties are estopped to deny admissions or declarations, deliberately made by them in judicial proceedings." *Compton vs. Stanford, 30 La. Ann. 838.* See also: *Douglas vs. Nicholson, 140 La. 1098, 74 So. 566 (1917); Bank of Coushatta vs. Burch, 148 So. 681, 177 La. 465; Prieto Lumber Company vs. Shoultz, 111 So. 857, (1959); Leitz Egan Funeral Home vs. Ridgley, 189 So. 647 (1939); Penn vs. Burke, 152 So.2d 16, 244 La. 267 (1963); Franklin vs. Zurich Insurance Company, 136 So.2d 735 (1961); Home Indemnity Company vs. Williamson, 183 F.2d 572 (5th Cir. 1950).*

In addition to the fact that the complaints, pre-trial briefs, and joint pre-trial stipulation in this case reveal no conflict of interest, it should be noted that

counsel for the survivors of the driver, as well as counsel for the survivors of the passengers who was designated lead counsel, was given a full and complete opportunity to develop the evidence, and equal opportunity for argument. The amended pre-trial order issued on August 22, 1963 provided that:

> "Of course, Mr. Simon will conduct the examination in chief of each witness, and if at the conclusion of his examination, Mr. Mouton feels there are any questions that he should ask, the court will give him permission to do so. . . . I will let Mr. Mouton make an opening statement as well as Mr. Simon, and in the event there are additional questions after Mr. Simon finishes his examination of any witness, he will be permitted to go into questions touching upon negligence of the driver. . . . the pre-trial order of August 15 is modified to this extent and will be modified at the trial as this circumstance may warrant, so that each party will have full rights of examination of all witnesses."

The record reveals no motion or request by either of the counsel for plaintiffs for a modification of the pre-trial order. It would seem only reasonable to expect that any actual conflict which had manifested itself to these attorneys for plaintiffs during the trial would have been brought to the attention of the court. The absence of any information of this type in the record indicates that there was no conflict.

Further, it is clear that Mr. Simon would have acted as lead counsel for all of the plaintiffs in these cases even had there been no order to that effect by the trial judge. This is so because, at the time of the trial of this case, the law firm of Simon & Trice represented all of the plaintiffs, the survivors of the passengers as well as the survivors of the driver. As of April 1st, 1964, Mr. John Rixie Mouton, attorney of record for the survivors of the driver, became employed as an associate by the law firm of Simon & Trice and at all times during the trial of the case, Mr. Mouton was an associate attorney in the firm. Even prior thereto, during the entire preparation of the case for trial, in the taking of depositions, in the preparation of briefs, in arguing the numerous motions which were presented to the District Court, and in all other preliminary matters presented to the District Court, Mr. Simon was the lead counsel for all parties plaintiff. He was in charge of the case. After Mr. Mouton became an employee and associate in Mr. Simon's firm, Mr. Simon continued to be the lead counsel and continued in charge of the entire case for all of the plaintiffs. It was clearly apparent to everyone, including the Lower Court, that Mr. Simon was the lead counsel in all cases, and in appointing lead counsel, he only ordered the continuation of an existing situation. For all practical purposes, therefore, the order of Court, appointing lead counsel did not add designation of lead counsel neither created any conflict of interest in the four cases, nor did it place any any new burden on lead counsel, Mr. Simon.

Considering the foregoing, it is submitted that the

additional burden on Mr. Simon, as lead counsel, and the Fifth Circuit Court of Appeals was in error in relying on this as a ground for reversal of these cases.

III. The Survivors Of The Driver Were Not Prejudiced In Any Way By The Consolidation Of Cases And Designation Of Lead Counsel.

While petitioner strongly urges that there was no error whatever in consolidating these four cases for trial and that the designation of lead counsel in no way prejudiced any of the plaintiffs, it is strongly urged, as an alternative position, that there is no basis whatever for the finding by the Fifth Circuit that the survivors of the driver were prejudiced.

The court concluded there was a probability that the jury had imputed the negligence of the driver to the passengers, contrary to the instructions given by the court, and all the parties were deprived of a fair hearing.

As the jury was very adequately and concisely instructed with reference to the imputation of negligence problem, (see the instruction at p. 12, *supra*) the court's conclusion amounts to a finding that the jury disregarded the instructions of the court. This is contrary to well settled jurisprudence to the effect that, on appeal, the courts may not assume that the jury disregarded the court's instructions. *Baltimore & Ohio Railroad Company v. Felgenhauer, 8th Cir. 1948, 168 F.2d 12; Graf v. Holcombe, 8 Cir. 277 F.687; Valley Shoe Corporation v. Stout, 8 Cir. 98 F.2d 514; Equitable Life Assurance Society of the United States*

v. Sieg, 6 Cir. 53 F.2d 318; Crockett Engineering Company v. Ehret Magnesia Mfg. Co., 156 F.2d 817, 81 U.S. App. D.C. 159; Bocchicchio v. Curtis Publishing Company, 203 F.Supp. 403, D.C. Penn. 1962.

However, even assuming, contrary to the law, that the jury did disregard the instructions given it by the court, this in no way indicates that the case of the survivors of the driver was in any way prejudiced by the consolidation or appointment of lead counsel. In order for the jury to have imputed the negligence of the driver to the guest passengers it would certainly be prerequisite that the jury first find the driver himself negligent. The question of the driver's negligence was clearly a jury question, and was decided in favor of defendant after careful deliberation by the jury. It can hardly be argued that the jury's finding of negligence against the driver is erroneous simply because the jury may possibly have imputed the driver's negligence to the passengers, but this would appear to be the conclusion reached by the Fifth Circuit Court of Appeals.

The lack of prejudice to the survivors of the driver was pointed out by Judge Thornberry in his dissent wherein he stated:

> "I am not convinced that the substantial rights of the driver's survivors were prejudiced by the trial court's action. Their case was more difficult than that of the passengers' survivors; they alone were required to refute any evidence of contributory negligence on the part of the driver. Thus, any confusion in the minds of the jurors resulting

from the consolidation would tend to prejudice the case of the passengers' survivors, not that of the driver's." (366 F.2d 193, 198.)

Judge Thornberry also pointed out that the designation of lead counsel did not create any prejudice to the case presented by the survivors of the driver because of the liberality of the pre-trial order designating lead counsel which allowed attorneys for both groups to examine or cross-examine all witnesses as well as make separate arguments to the jury.

Thus, it appears that no prejudice resulted to those plaintiffs who were suing as survivors of the deceased driver of the automobile by virtue of the consolidation and designation of lead counsel, and it is submitted that the judgment of dismissal as to these plaintiffs entered by the District Court should be reinstated.

CONCLUSION.

By holding that the four cases presented in this consolidated trial were not properly consolidated and that, by the consolidation and designation of lead counsel the trial court abused its discretion, the Fifth Circuit Court of Appeals has severely restricted the scope of the discretion generally given the trial court. As petitioners have attempted to show, these four cases presented no conflicting claims whatever in their pleadings, and were simply four suits against the same defendant arising out of the same collision. To deprive the trial judge of his discretion to consolidate litigation of this nature and to designate one of the attorneys for the various plaintiffs as lead counsel in

order to expedite the proceedings is clearly contrary to the obvious intent of Rule 42 (a) in which the judge is given very broad discretion to consolidate cases and make such other orders as are necessary to avoid unnecessary costs or delay.

It is further submitted that the Fifth Circuit Court of Appeals was in error in relying on the case of *Atkinson v. Roth* as authority in reversing these cases because that case involved a substantially different factual situation, and the only language found therein which bears on the factual situation here presented is dictum taken out of context.

Because the judgment herein constitutes unwarranted interference by the appellate court with the prerogatives granted the trial judge by Rule 42 (a) and Rule 61 of the Federal Rules of Civil Procedure, and because the substantial rights of the plaintiffs were not prejudiced by the trial judge's action, petitioner prays this Honorable Court grant this petition for writ of certiorari.

Respectfully submitted,

DAVIDSON, MEAUX, ONEBANE
& DONOHOE,
By J. J. DAVIDSON, JR.,
Attorneys for Southern Pacific
Company,
201 West Main Street,
Lafayette, Louisiana.

PROOF OF SERVICE.

I, J. J. Davidson, Jr., attorney for petitioner and a member of the bar of the Supreme Court of the United States, hereby certify that on this day I served copies of the foregoing petition for writ of certiorari on Mr. J. Minos Simon, c/o Simon, Trice & Mouton, Attorneys at Law, P. O. Box 52116, OCS, Lafayette, Louisiana, and upon Mr. John Rixie Mouton, c/o Simon, Trice & Mouton, Attorneys at Law, P. O. Box 52116, OCS, Lafayette, Louisiana and upon Arceneaux & Beslin, Attorneys at Law, P. O. Building, Rayne, Louisiana, attorneys for plaintiffs by depositing copies thereof in the United States Mail properly addressed to the said attorneys, postage prepaid.

Lafayette, Louisiana, January . . ., 1967.

J. J. DAVIDSON, JR.

APPENDIX "A".

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 22412

NATHALIE L. DUPONT,
Plaintiff-Appellant,

versus

SOUTHERN PACIFIC COMPANY,
Defendant-Appellee.

VELMA MARGARET DUPONT, Indiv. and next friend for MARK VILLEJOIN,
Plaintiff-Appellant,

versus

SOUTHERN PACIFIC COMPANY,
Defendant-Appellee.

NATHALIE LEGER, ET AL,
Plaintiff-Appellant,

versus

SOUTHERN PACIFIC COMPANY,
Defendant-Appellee.

ANNA LOUISE DUPONT TRAHAN, Indiv. and next friend of MICHAEL JOSEPH TRAHAN,
Plaintiff-Appellant,

versus

SOUTHERN PACIFIC COMPANY,
Defendant-Appellee.

Appeals from the United States District Court for the Western District of Louisiana.

(September 21, 1966.)

Before BELL and THORNBERRY, Circuit Judges, and FISHER, District Judge.

FISHER, District Judge: These consolidated cases involve a railroad crossing collision between the Sunset Limited, a Southern Pacific train, and a 1953 Chevrolet automobile occupied by the driver and three guest passengers, all of whom were killed in the accident of June 25, 1961. The appellants are the survivors of the driver of the automobile and the three guest passengers. Originally a separate suit was filed on behalf of each of the survivors of the passengers and the driver. As a result of rulings on motions filed by appellee, the trial court ordered that single suits be filed on behalf of all survivors of each of the three passengers. A similar ruling was made in respect to survivors of the driver. Thus, four separate suits were filed.

On August 15, 1963, the trial court, sua sponte, ordered all four cases to be consolidated for purposes of trial, pursuant to Rule 42(a), Federal Rules of Civil Procedure,[1] and further ordered the separation of the issue of liability from the issue of damages, with the liability issue to be tried first. The pre-trial order further provided that the attorneys representing appellants were required to designate a lead counsel for the purposes of the trial.[2]

Counsel for the survivors of the passengers filed a motion to recall the pre-trial order of August 15, 1963, in which they expressly objected to the consolidation of their cause of action with a suit filed by the survivors of the driver, citing as grounds that such a consolidation would create confusion and prejudice; further contending that the appointment of the lead counsel would result in a conflict of interests between the survivors of the driver and the survivors of the passengers.[3]

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1 Rule 42(a) Consolidation. "When actions involving a common question of law or fact are pending before the court, it may order a joint hearing or trial of any or all matters in issue in the actions; it may order all the actions consolidated; and it may make such orders concerning proceedings as may tend to avoid unnecessary costs or delay."

2 "The attorneys representing plaintiffs in all actions will designate a trial attorney who will participate as the leading attorney at the trial of these cases on the question of liability. The attorney so designated will examine and cross-examine all witnesses for either plaintiff or defendant used at the trial of this issue, provided, however, that he may designate one of the other attorneys to interrogate on direct or cross-examination any one or more witnesses for either plaintiff or defendant but the attorneys so designated shall conduct the entire examination of such witness or witnesses." (R. 184)

3 (1) "It is movants' contention that the negligence of both the operator of the automobile and the operators of the train in question concurred to bring about the death of the

At a pre-trial conference on August 22, 1963, the court denied appellants motion to recall the order of August 15th, and at that time counsel for the survivors of the passengers, under order of the court, was designated as lead counsel for all plaintiffs,[4] although the pre-trial order was modified to provide that at the trial as circumstances warranted each party might have full right of examination of all witnesses. Lead counsel was, under order of the court, required to act as advocate of the survivors of the driver in addition to representing his clients, the survivors of the passengers.

The four cases as consolidated were tried to a jury; and after several hours of deliberating, the jury returned a verdict in favor of defendant against the survivors of the driver. Whereupon, without disclosing what the verdict was, the trial court instructed the

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guest passengers. The consolidation order of August 15, 1963, necessarily operated to create confusion and is prejudicial to the interests of movants, especially in view of the fact that the negligence of the driver of the vehicle is not imputable to the guest passengers."

(2) "Movants further aver that there is a conflict of interest between movants and the litigants, or survivors of the driver of the automobile, inasmuch as movants contend and intend to prove that the death of the guest passengers resulted from the concurrent negligence of the driver of the automobile and the operators of the defendant's train." (R. 205-206)

[4] The Court then made the following comment: "Of course, Mr. Simon will conduct the examination in chief of each witness, and if at the conclusion of his examination, Mr. Mouton (counsel for the survivors of the driver) feels there are any questions that he should ask, the court will give him permission to do so . . . I will let Mr. Mouton make an opening statement as well as Mr. Simon, and in the event there are additional questions, after Mr. Simon finishes his examination of any witness, he will be permitted to go into questions touching upon negligence of the driver." (R. 241-242)

jury to continue its deliberations and to return a verdict in all four cases. Sometime thereafter the jury returned four general verdicts in favor of the defendant and against all of the plaintiffs.

Appellants motion for new trial was over-ruled and this appeal followed.

The appellants make the following assignment of errors:

1. That the consolidation of the four cases and the requirements by the court that the plaintiffs designate a lead counsel to represent all plaintiffs constituted reversible error.

2. That the trial court erred in failing to give the jury certain instructions requested by plaintiffs.

3. That the trial court erred as a matter of law in not finding in favor of the survivors of the guest passengers.

The only assignment of error appearing to be meritorious is number one and we believe this assignment should be sustained and the cases reversed and remanded.

Trial judges are urged to make good use of Rule 42(a) of the Federal Rules of Civil Procedure where there is involved a common question of fact and law as to the liability of the defendant, in order to expedite the trial and eliminate unnecessary repetition

and confusion; and where the parties are represented by different counsel and the trial court permits full and complete development of the evidence by all parties, equal opportunity for argument, a clear and complete charge on the facts and the law applicable to the respective theories of all parties, the order of consolidation by the trial judge will not be disturbed on appeal except for abuse of discretion. *Whiteman v. Pitrie*, 220 F.2d 914 (5th Cir. 1955); *Plough v. Baltimore & O.R. Co.*, 172 F.2d 396 (2nd Cir. 1949); *Davis v. Yellow Cab Co. of St. Petersburg*, 220 F.2d 790 (5th Cir. 1955); 5 Moore's Fed. Practice, 2nd Ed.Par. 42.02, p. 1204; *Walker v. Loop Fish & Oyster Co.*, 211 F.2d 777 (5th Cir. 1954); *Potito v. Molasky*, 123 F.2d 258 (8th Cir. 1941).

However, in resorting to the use of Rule 42(a) the trial judge should be most cautious not to abuse his judicial discretion and to make sure that the rights of the parties are not prejudiced by the order of consolidation under the facts and circumstances of the particular case. Where prejudice to rights of the parties obviously results from the order of consolidation, the action of the trial judge has been held reversible error. *Atkinson v. Roth*, 297 F.2d 570 (3rd Cir. 1961); *United States v. Knauer*, 149 F.2d 519 (7th Cir. 1945); *Capstraw v. New York Central R.R. Co., Sielagowski v. New York Central R.R. Co.*, 15 F.R.D. 267; *Bascom Launder Corp. v. Telecoin Corp.*, 15 F.R.D. 277; *Ex Parte Miller*, 142 So.2d 910.

In *Atkinson v. Roth, supra,* seven actions were instituted in the court below stating claims arising out of a collision between an automobile driven by one Atkinson and a tractor-trailer driven by one Roth. Atkinson had five passengers in his vehicle. A number of separate actions were commenced by the numerous plaintiffs, some against both Atkinson and Roth, and others against one or the other with the remaining parties being brought in as third-party defendants.

On motion of Roth and his alleged employers, all the actions were consolidated for trial over the objections of plaintiffs. The Court of Appeals for the Third Circuit held,

> "All of the suits stating claims by passengers or their representatives, however, could proceed without conflict. But Atkinson (driver) as plaintiff was obligated to keep his case free of contributory negligence, and in this he was at cross purposes with the other plaintiffs. The presence of Atkinson, quo defendant, in the same trial with Atkinson, quo plaintiff, emphasizes the conflict. In these circumstances, proper concern for due administration of justice seems to indicate to us the wisdom of avoiding another trial in which Atkinson appears as plaintiff along with his passengers or their representatives."

Thus, in *Atkinson v. Roth, supra,* the confusion and harm resulted from the consolidation of various

causes of action in which the plaintiff driver appeared as both plaintiff and defendant and the Third Circuit Court of Appeals held that such a situation could not be other than prejudicial to the party plaintiffs. In the instant case we do not have the driver of the automobile appearing as party defendant and no cause of action is brought against his estate, but we do have the survivors of the guest passengers making the contention that the accident resulted from the concurrent negligence of the driver of the automobile and the defendant. The trial court entering the order of consolidation went further and also ordered the designation of a lead counsel for all plaintiffs. Thus, the harm lies not only in the confusion resulting from the consolidation, but also in the fact that the rights of the parties are prejudiced because of the definite conflict of interest which is emphasized by the order of the court requiring the lead counsel to represent both sets of plaintiffs. In representing all plaintiffs, lead counsel must contest contributory negligence on the part of the driver, but in doing so he increases his burden and prejudices the interest of his clients, the survivors of the passengers, since the negligence of the driver not being imputed to the passengers will permit the survivors of the passengers to recover notwithstanding a finding of contributory negligence on the part of the driver. To advise the jury of this fact and to make this contention in representing the survivors of the passengers, lead counsel fails in his duty and obligation to the survivors of the driver. He, therefore, cannot properly and adequately represent either set of plaintiffs if required to represent all

plaintiffs. The order of consolidation, together with the order requiring lead counsel for all plaintiffs, created an impossible situation which resulted in neither set of plaintiffs receiving the representation to which they are entitled.

In view of the disposition made of this appeal, a discussion of assignment number two, which is the same for both sets of plaintiffs in the court below, is not indicated other than to comment that the trial court did not err in refusing to give the requested charges No. 7 and No. 10.[5] The charge given by the Court, while not in the specific language requested, we believe substantially and adequately covered the issues raised by the evidence and the action of the

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[5] Charge No. 7: "If a crossing is unusually dangerous because the view of the motorist is so obstructed as to require that he place himself in a position of peril dangerously near the tracks, before he has a view of the oncoming train, the railroad company will be liable in damages, unless it can show that it took unusual precautions, such as reducing the speed of the train, or increasing its warnings, or providing signaling devices, et cetera.

"The theory of this legal rule is that the railroad may not rely upon the duty of the motorist to stop and look, if the physical circumstances are such that stopping and looking will do the motorist no good."

Charge No. 10: "Because of the basic human instinct of self-preservation, the law presumes that a driver did not commit suicide by going onto the railroad track if he had actual knowledge of the approaching train.

"This presumption arises in cases where the driver is killed. Consequently, it is presumed that the driver in this case did not actually know of the approaching train, and the test as to whether he was contributorily negligent is whether he should have become aware of the danger if he had stopped to look and listen before reaching the tracks, and whether, if he had stopped within the distance stated in the law, he could have perceived the danger of the approaching train which he could not perceive as well while continuing forward without stopping."

trial court in refusing the requested charges was not error.

As to assignment number three, made by the survivors of the passengers, the trial court was correct in refusing to enter judgment as a matter of law and in refusing to grant a new trial because obviously a jury question existed.

In support of their position, survivors of the guest passengers point out,

> "That defendant has admitted by stipulation that at the time of the collision the train was being operated at a speed in excess of 75 miles per hour, the maximum self-imposed speed limit at the grade crossing in question, and therefore as a matter of law the defendant was guilty of negligence. On the other hand, as a matter of law the guest passenger could not be guilty of contributory negligence because they owed the duty to warn only if they realized the driver was not going to stop, and under the admission of the defendant, the guest passengers had every reason to believe that the driver was going to stop, since Mr. Reed, the engineer and witness for the defendant, testified that the driver of the automobile approached the grade crossing at a rate of speed of about 10 miles per hour and when he got within a few feet of the tracks he brought his vehicle to 'almost stop' convincing Mr. Reed that the driver would stop, and then

> suddenly accelerated the vehicle when the train was about 100 feet from the intersection, in consequence of which the train hit the car 'smack in the middle' as it straddled the railroad track."[6]

Accepting the interpretation of the testimony as viewed by the appellant in its most favorable light, there were clearly jury questions to be determined as to whether each of the passenger occupants of the automobile was guilty of contributory negligence, and whether defendant's negligence was a proximate cause.

Further, as is pointed out by appellee, there was no request for a directed verdict under Rule 50, Federal Rules of Civil Procedure, 28 U.S.C.A., and thus the appellate court is powerless to review the sufficiency of the evidence. See *Stokes v. Continental Assurance Company*, 242 F.2d 983 (5th Cir. 1957); *Pruett v. Marshall*, 283 F.2d 436 (5th Cir. 1960).

An appellate court may reverse a district court for denying a new trial based on the verdict not being supported by the evidence if the denial was an abuse of discretion. *Pruett v. Marshall, supra.* However, there must be a clear abuse of discretion, and if a reasonable basis exists for a jury verdict, there may be no reversal. *Lavender v. Kern*, 1946, 327 U.S. 645, in which the court held,

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[6] Testimony of defense witness, Mr. Reed. (R. 157-163)

". . . it would be an undue invasion of the jury's historic function for an appellate court to weigh the conflicting evidence, judge the creditability of the witnesses, and arrive at a conclusion opposite of the one reached by the jury."

In view of the jury verdict and the manner in which it was returned, we must conclude that some confusion existed with the probability that the jury in some way imputed the negligence of the driver to the guest passengers contrary to the instructions of the court, all of which resulted to the prejudice of the parties caused by the order of consolidation with the designation of a lead counsel to represent all of the plaintiffs.

These consolidated cases are, therefore, REVERSED and REMANDED for further proceedings not inconsistent with this opinion.

THORNBERRY, Circuit Judge, Concurring in Part and Dissenting in Part:

I agree with the majority that the judgment of the trial court must be reversed and remanded as to the survivors of the passengers. I must respectfully dissent, however, from that portion of the Court's decision reversing and remanding the lower court's judgment as to the survivors of the driver.

As stated by the majority, consolidation under Rule 42(a) is within the sound discretion of the trial court,

and action pursuant thereto will be overturned upon appeal only for an abuse of discretion. *Stember v. Burke*, 6th Cir. 1965, 344 F.2d 393; *Nelson v. Grooms*, 5th Cir. 1962, 307 F.2d 76; *Davis v. Yellow Cab Co.*, 5th Cir. 1955, 220 F.2d 790; *Gillette Motor Tr. v. Northern Oklahoma Butane Co.*, 10th Cir. 1950, 179 F.2d 711. The standard of appellate review by which the exercise of the trial court's discretion is to be judged is predicated upon Rule 61 of the Federal Rules of Civil Procedure:

> [N]o error or defect in any ruling or order . . . by the court . . . is ground for granting a new trial or for setting aside a verdict or for vacating, modifying or otherwise disturbing a judgment or order, unless refusal to take such action appears to the court inconsistent with substantial justice. The court at every stage of the proceeding must disregard any error or defect in the proceeding which does not affect the substantial rights of the parties.

Thus, to find an abuse of discretion the appellate court must feel that, on an examination of the record as a whole, the action complained of adversely affected the substantial rights of the complaining party. *Box v. Swindle*, 5th Cir. 1962, 306 F.2d 882; *Bell v. Swift & Co.*, 5th Cir. 1960, 283 F.2d 407; Barron & Holtzoff §§ 1351, 1357 (Wright ed.).

Applying this standard, I am not convinced that the substantial rights of the driver's survivors were prej-

udiced by the trial court's action. Their case was more difficult than that of the passengers' survivors; they alone were required to refute any evidence of contributory negligence on the part of the driver.[1] Thus, any confusion in the minds of the jurors resulting from the consolidation would tend to prejudice the case of the passengers' survivors, not that of the driver's.

The record also fails to reveal that the appointment of the attorney of the passengers' survivors as lead counsel prejudiced the survivors of the driver. The trial judge expressly provided in his order that the attorneys for both groups of plaintiffs would be allowed to examine or cross-examine all witnesses as well as make separate arguments to the jury. Counsel for the survivors of the driver availed himself of this privilege on several occasions. Furthermore, the trial judge's order appointing lead counsel stated that the procedure could be altered on the motion of any party if the circumstances so required. No such motion was presented during the trial. Upon this state of the record, I cannot conclude that the survivors of

[1] It would appear that the Louisiana law on imputation of negligence is unusually favorable to guest passengers of motor vehicles. Such passengers are not required to keep a look-out, but may entrust their safety to the driver, where they have no reason to believe that he is incompetent. Even where the passenger becomes aware of danger that the driver apparently does not see, the duty to warn depends upon the opportunity to do so. Also, without indication to the contrary, a passenger may assume that the driver sees and will heed traffic signals and defer to approaching traffic. See Gaspard v. LeMaire, 245 La. 239, 158 So.2d 149 (1963); Dowden v. Southern Farm Bureau Casualty Ins. Co., 158 So.2d 399 (Ct. App. La. 1963); LeBlanc v. Southern Farm Bureau Casualty Ins. Co., 157 So.2d 329 (Ct. App. La. 1963).

the driver were denied effective assistance of counsel.

The majority relies heavily upon *Atkinson v. Roth*, 3rd Cir. 1961, 297 F.2d 570. That case is not controlling here as the factual situation involved differed significantly. This is apparent merely from the brief resume of *Atkinson* set out in the majority opinion. Furthermore, aside from the fact that Atkinson was both plaintiff and defendant in the consolidated cases, a deciding factor appears to have been the unsatisfactory presentation of the case to the jury in the charge and instructions.[2] We have no such situation in the present case.

The proper regulation of trial proceedings is the duty and function of the trial judge, and the appellate court should treat with due deference his actions in this area. The survivors of the driver have not demonstrated that their case was so prejudiced as to require a finding of abuse of discretion and the ordering of further litigation, burdensome to both the appellee and the courts. Therefore, the judgment as to these parties should be affirmed.

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[2] An example of this is the following language:
We note, too, that the court below did not include in its charge to the jury a direction that the negligence of Atkinson could not be imputed to his passengers. 297 F.2d at 575.

APPENDIX "B".

UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

October Term, 1965.

No. 22412.

D. C. Docket No. 8896, 9113, 9114 & 9124-Civil Actions.

NATHALIE L. DUPONT, ET AL.,
Appellants,

versus

SOUTHERN PACIFIC COMPANY;
Appellee.

Appeals from the United States District Court for the Western District of Louisiana.

Before BELL and THORNBERRY, Circuit Judges, and FISHER, District Judge.

JUDGMENT.

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Louisiana, and was argued by counsel;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment

of the said District Court in this cause be, and the same is hereby, reversed; and that this cause be, and it is hereby remanded to the said District Court for further proceedings not inconsistent with the opinion of this Court;

It is further ordered and adjudged that the appellee, Southern Pacific Company, be condemned to pay the costs of this cause in this Court for which execution may be issued out of the said District Court.

September 21, 1966.

THORNBERRY, Circuit Judge, concurs in part and dissents in part.

Issued as Mandate: Nov. 1, 1966.

Court Costs payable to Clerk, U. S. Court of Appeals: Docketing cause, etc.....$25.00.

APPENDIX "C".

IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

No. 22,412.

NATHALIE L. DUPONT,
Plaintiff-Appellant,

vs.

SOUTHERN PACIFIC COMPANY,
Defendant-Appellee.

VELMA MARGARET DUPONT, Indiv. & next friend for MARK VILLEJOIN,
Plaintiff-Appellant,

vs.

SOUTHERN PACIFIC COMPANY,
Defendant-Appellee.

NATHALIE LEGER, ET AL,
Plaintiff-Appellant,

vs.

SOUTHERN PACIFIC COMPANY,
Defendant-Appellee.

ANNA LOUISE DUPONT TRAHAN, Indiv. and next friend of MICHAEL JOSEPH TRAHAN,

Plaintiff-Appellant,

vs.

SOUTHERN PACIFIC COMPANY,

Defendant-Appellee.

Appeal from the United States District Court for the Western District of Louisiana.

ON PETITION FOR REHEARING

(October 24, 1966.)

Before BELL and THORNBERRY, Circuit Judges, and FISHER, District Judge.

PER CURIAM: It is ORDERED that the petition for rehearing in the above entitled and numbered cause be, and the same is hereby

DENIED.